

INHERITING DIGITAL ASSETS: DOES THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT FALL SHORT?

PATRICIA SHERIDAN*

CONTENTS

I.	INTRODUCTION.....	364
II.	EXISTING FEDERAL LAWS DEALING WITH DIGITAL ASSETS	365
III.	REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT	367
IV.	PROPERTY INTEREST IN DIGITAL ASSETS	373
V.	INHERITING DIGITAL ASSETS AFTER RUFADAA: WHAT ISSUES REMAIN?	377
VI.	CONCLUSION	393

* Associate Professor of Law, O'Malley School of Business, Manhattan College.

I. INTRODUCTION

Most of us frequently engage in online communications, and our digitally stored property has largely replaced boxes of letters and photo albums that were once stashed in the attic. As the types and complexity of digital property grow, questions regarding the transfer and disposition of such items have intensified as well. Despite the prevalent usage of digital technology, the law has not entirely kept pace with the rapid creation of new methods that we use to communicate and store content. Dealing with digital property after the account owner's death has emerged as an important issue for state legislatures, online service providers, and the family members of those individuals who maintain an online presence.

The term "digital assets" broadly refers to accounts, documents, information, records, and photos that are accessible via an electronic device. Transactions involving digital assets are governed by a complex set of federal and state laws, as well as the private contractual agreements between the online service provider and the account holder. In an attempt to provide some guidance for fiduciaries who deal with digital assets, the Uniform Law Commission approved the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA") in 2015. RUFADAA seeks to apply existing laws governing fiduciaries to this new and increasingly popular form of property.

The Uniform Law Commission addressed many of the difficulties encountered by an executor administering the estate of a deceased account holder. Certain provisions of RUFADAA, however, reinforce the online service provider's ability to dictate what happens to digital assets after a person dies. This article will outline the framework of RUFADAA and summarize its key provisions, focusing on the disposition of electronic records and other digital files of a deceased account holder. It will examine whether a property interest exists in digital assets and if it is capable of being inherited and will describe the typical provisions contained in terms of service agreements that validate ownership rights in digital property. The article will explore the meaning of "disclosure" for purposes of RUFADAA and explain

how the lack of clearly defined fiduciary powers creates uncertainty for those attempting to marshal the digital property of a deceased account holder. The article will examine the instances when a court order is required before a fiduciary may gain access to the digital assets of a deceased person. Then it will address whether RUFADAA affords online service providers too much discretion to decide when a court order is warranted. Lastly, the article will discuss whether forum selection and choice of law provisions contained in standard terms of service agreements should be enforceable against a fiduciary acting on behalf of a deceased account holder's estate.

II. EXISTING FEDERAL LAWS DEALING WITH DIGITAL ASSETS

Nearly seven in ten Americans use social media to connect with one another,¹ and over 95% own a smartphone.² According to one survey conducted by McAfee, almost 51% of consumers spend 15 hours or more on their digital devices for personal use each week,³ and, on average, we have over \$35,000 worth of assets stored on these devices.⁴ There is no single definition of what is considered a "digital asset," but the term has been broadly interpreted to include email accounts, text messages, social networking accounts (such as Facebook, LinkedIn, and Twitter), online credit card and banking accounts, photographs and videos stored online, photo and video sharing accounts (such as Instagram and YouTube), documents, cloud storage accounts (such as Dropbox, iCloud, and Microsoft OneDrive), digital music subscriptions (such as iTunes, Spotify, and Pandora)

¹ *Social Media Fact Sheet*, PEW RESEARCH CENTER: INTERNET AND TECHNOLOGY (June 12, 2019), <http://www.pewinternet.org/fact-sheet/social-media> [<https://perma.cc/K2TC-73CD>].

² *Mobile Fact Sheet*, PEW RESEARCH CENTER: INTERNET AND TECHNOLOGY (June 12, 2019), <http://www.pewinternet.org/fact-sheet/mobile> [<https://perma.cc/9CNR-5AE3>].

³ *How Do Your Digital Assets Compare?*, MCAFEE: BLOG (May 14, 2013), <https://blogs.mcafee.com/consumer/digital-assets/> [<https://perma.cc/3UDL-XCBL>].

⁴ *Id.* A 2012 Wall Street Journal article found that Americans valued their digital assets at \$55,000. Kelly Greene, *Passing Down Digital Assets*, WALL ST. J. (Aug. 31, 2012, 8:20 PM), <http://www.wsj.com/articles/SB10000872396390443713704577601524091363102> [<https://perma.cc/TC2Z-7L7S>].

domain names, blogs, web pages, virtual currencies (such as Bitcoin), and hotel and airline mileage awards and points.⁵ Stated more concisely, digital assets are electronic records in which an individual has a right or interest, but not the underlying asset or liability unless the asset or liability is itself an electronic record.⁶

Whatever definition is used, the growing presence of technology and electronic devices in our daily lives has led to important questions regarding the creation, transfer, and inheritability of digital property. The large amount of information kept in password-protected online accounts creates unique challenges for fiduciaries. During a person's lifetime, access to digital assets is primarily governed by the terms of service agreement between the account holder and the company that stores the information on their server. When the account holder dies, however, federal and state laws pose legal obstacles for an executor or personal representative seeking to gain access to the decedent's online accounts in order to manage the underlying property stored there in fulfillment of their fiduciary obligations.

Existing federal and state laws are primarily aimed at protecting the user's privacy and preventing misuse of digital assets by third parties. The Stored Communications Act ("SCA"),⁷ a component of the Electronic Communications Privacy Act,⁸ prohibits an electronic communication service or a remote computing service from knowingly divulging the contents of a communication that is stored by, carried by, or maintained by that service.⁹ The SCA provides that it is a criminal offense for an individual to "intentionally access . . . without

⁵ See Matthew D. Glennon, Note, *A Call to Action: Why the Connecticut Legislature Should Solve the Digital Asset Dilemma*, 28 QUINNIPIAC. PROB. L.J. 48, 53 (2014); Kristina Sherry, Comment, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185, 193-94 (2012).

⁶ REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 2(10) (Unif. L. Comm'n, 2015) [hereinafter RUFADAA].

⁷ 18 U.S.C. §§ 2701-12 (2012).

⁸ Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (2012) (codified as amended at 18 U.S.C. §§ 2510-22, 2701-12, 3121-27).

⁹ 18 U.S.C. § 2702 (2012).

authorization a facility through which an electronic communication service is provided.”¹⁰ One exception under the SCA permits the provider to divulge the contents of a communication “with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.”¹¹ The SCA protects the “contents” of a communication but does not apply to non-content information records such as the user’s name and address, network IP address, or addressee’s name and address.¹²

Another federal law governing digital assets is the Computer Fraud and Abuse Act (“CFAA”), which prohibits “unauthorized access to computers.”¹³ For purposes of the CFAA, unauthorized access technically occurs when any person other than the account owner accesses the online account in violation of the access rules set forth in a provider’s terms of service agreement.¹⁴ The CFAA does not contain a specific exemption for fiduciaries, so an executor who uses the deceased user’s password to gain access to an account may be in violation of federal law. In addition to the difficulties fiduciaries may encounter under federal law, all fifty states have enacted anti-hacking statutes that prohibit unauthorized access to another’s computer systems.¹⁵

III. REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

The Uniform Law Commission recognized the need to address fiduciary access to digital assets and formed a drafting committee in 2012 to write model legislation attempting to apply existing laws

¹⁰ 18 U.S.C. § 2701(a) (2012).

¹¹ 18 U.S.C. § 2702(b)(3) (2012).

¹² 18 U.S.C. § 2702(a)(3) (2012).

¹³ 18 U.S.C. § 2701 (2012).

¹⁴ 18 U.S.C. § 1030 (2012).

¹⁵ *Computer Crime Statutes*, NAT’L CONFERENCE OF STATE LEGISLATURES (FEB. 24, 2020), <http://www.ncsl.org/research/telecommunications-and-information-technology/computer-hacking-and-unauthorized-access-laws.aspx> [<https://perma.cc/3PQX-X2JS>].

governing fiduciaries to digital assets. The drafting committee sought to balance the fiduciary's responsibility to manage digital property on behalf of a deceased person against the online service providers' desire to protect the privacy interests of their account holders. After multiple revisions, the Uniform Fiduciary Access to Digital Assets Act ("UFADAA") was approved by the Uniform Law Commission in July 2014.¹⁶ According to its default provisions, UFADAA granted fiduciaries broad access to digital accounts absent a clear prohibition by the decedent. Following approval of the model act, legislation to adopt UFADAA was introduced in multiple states. Ultimately, however, Delaware became the only state to adopt a version of UFADAA.¹⁷ Legislation in other states was blocked by a coalition of Internet service providers and privacy advocates who objected primarily to UFADAA's default provisions granting fiduciaries broad access to the personal information of the deceased account owner.¹⁸ Even after UFADAA's approval in Delaware, Google, AOL, Net Choice and others strongly urged Delaware's governor to veto the legislation, claiming that it "removes privacy protections for Delaware citizens, overrides user privacy choices, sets the privacy of Delaware residents lower than the federal standard, forces businesses to choose between violating a state law and risking violating a federal one, and ignores contract provisions long respected by the state."¹⁹

In response to the criticism aimed at UFADAA, the Uniform Law Commission reconvened and produced a revised version of UFADAA, which was approved in 2015.²⁰ To date, forty-two states and the U.S.

¹⁶ Access to Digital Assets of Decedents, Nat'l Conference of State Legislatures (May 23, 2019) <https://www.ncsl.org/research/telecommunications-and-information-technology/access-to-digital-assets-of-decedents.aspx> [<https://perma.cc/MS5V-FSA3>] [hereinafter "UFADAA"].

¹⁷ DEL. CODE ANN. tit. 12, § 5004 (2019).

¹⁸ Morgan M. Weiner, *Opposition to the Uniform Fiduciary Access to Digital Assets Act*, NAT'L L. REV. (Jul. 21, 2015), <http://www.natlawreview.com/article/opposition-to-uniform-fiduciary-access-to-digital-assets-act> [<https://perma.cc/4J4U-FNSZ>].

¹⁹ Letter from NetChoice to Delaware Governor Jack Markell (July 8, 2014), <http://netchoice.org/wp-content/uploads/Industry-Veto-Request-of-DE-HB-345-Signed.pdf>.

²⁰ RUFADAA § 2(10).

Virgin Islands have adopted RUFADAA.²¹ Similar legislation has been proposed in four additional states, leaving Delaware, Kentucky, Louisiana, and Oklahoma as the only states that have yet to undertake action to introduce RUFADAA.²² The basic framework of RUFADAA enables fiduciaries such as executors or administrators, court-appointed guardians or conservators, agents appointed under powers of attorney and trustees, to access online accounts after the account owner dies or loses the ability to manage the account.²³

Some key definitions are helpful in understanding the basic provisions of RUFADAA. A “user”²⁴ maintains an account with a “custodian”²⁵ who carries, maintains, processes, retrieves, or stores electronic data. The terms of service agreement, sometimes referred to as the user agreement or terms of use agreement, contains the set of rules and provisions that control the relationship between a user and a custodian.²⁶ An “online tool” is an electronic service provided by a custodian, separate from the terms of service agreement, that allows a user to provide directions for disclosure or nondisclosure of digital assets to a third person.²⁷

RUFADAA addresses the relationship between online tools, terms-of-service-agreements, and other written records documenting the user’s instructions for access to digital assets by setting up a three-tier system for disclosure. First, if a custodian provides an online tool that allows the account owner to specify another who is allowed access to the digital assets or to direct the custodian to delete the digital assets after the account owner’s death, the user’s online instructions are legally enforceable.²⁸ Second, if the custodian does not offer an online

²¹ *Fiduciary Access to Digital Assets Act, Revised*, Unif. L. Comm’n <https://my.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22> [<https://perma.cc/3ACU-P8XA>].

²² *Id.*

²³ RUFADAA, §§ 2(10), (14).

²⁴ *Id.* § 2(26).

²⁵ *Id.* § 2(8).

²⁶ *Id.* § 2(24).

²⁷ *Id.* § 2(16).

²⁸ *Id.* § 4(a).

planning tool, or if the user declines to use one, the user may give legally enforceable instructions as to the disposition of the digital assets in a will, trust, power of attorney, or other written record.²⁹ Third, if the user has not provided direction either online or pursuant to a will or other written record, the terms of service agreement for the user's account will determine fiduciary access to the user's digital assets.³⁰ In the event the terms of service agreement is silent as to fiduciary access, the default provisions of RUFADAA apply.³¹

According to the provisions of RUFADAA, the user's instructions in an online tool regarding account access take priority over any other instructions set forth in a will or any other written record. One example of an online tool is Google's "Inactive Account Manager" that allows users to select a trusted contact, not necessarily a fiduciary, for Google to notify after a certain period of account inactivity.³² By responding to a series of online prompts, the user can select which of their Google accounts the trusted contact can access, and which accounts should be deleted. When the user has filled out Google's online tool, the trusted contact will not receive the user's password or login details but may be provided with a link to download data from the Google YouTube, Drive, and Mail accounts specified by the deceased user.³³ Facebook also has its own online tool, which allows the user to choose a "Legacy Contact" to either maintain a memorialized account of the deceased user or permanently delete the

²⁹ *Id.* § 4(b).

³⁰ *Id.* § 4(c).

³¹ Rev. Unif. Fiduciary Access to Dig. Assets Act (2015), Summary Sept. 2017, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=91127209-1ee6-6702-9b80-bfb086ab2961&forceDialog=0> [<https://web.archive.org/web/20190620044553/https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=91127209-1ee6-6702-9b80-bfb086ab2961&forceDialog=0>].

³² *About Google Inactive Account Manager*, GOOGLE, <https://support.google.com/accounts/answer/3036546?hl=en> [<https://perma.cc/68PF-AZHC>].

³³ *Submit a Request Regarding a Deceased User's Account*, GOOGLE ACCT. HELP, <https://support.google.com/accounts/troubleshooter/6357590?hl=en> [<https://perma.cc/TFN3-NDK4>].

account.³⁴ Facebook's online tool has limited benefit since the legacy contact must be another Facebook user.³⁵

RUFADAA identifies electronic communications as one subset of digital assets, and makes a distinction between the "content" of electronic communications and a "catalogue" of electronic communications." The content of an electronic communication includes the subject line and body of email messages, text messages, instant messages, or social media posts that users send to a select group of people as opposed to the general public, and other electronic communication between private parties.³⁶ A catalogue of electronic communications is essentially a list of communications showing the electronic addresses of the sender and recipient and the time and date of the communication.³⁷ Because the content of a user's electronic communications implicate federal law and privacy concerns, RUFADAA mirrors the provisions of the SCA. RUFADAA preserves the default provision of user privacy in electronic communications by requiring the user to affirmatively "opt in" and consent to the disclosure of the content of electronic communications through the use of an online tool, will or other written record.³⁸

Social media accounts are treated as containing the content of electronic communications for purposes of RUFADAA. A Facebook profile, for instance, can be used both as a vehicle for exchanging messages with other users and as a platform for storing photos, videos and other non-protected digital property.³⁹ Instagram, which is owned by Facebook, is another popular social media network with over 1

³⁴ *Choose a Legacy Contact*, FACEBOOK: HELP CTR., https://www.facebook.com/help/991335594313139/?helpref=hc_fnav [<https://perma.cc/69X4-LLPR>].

³⁵ *Id.*

³⁶ RUFADAA, § 2(6) (A)-(C).

³⁷ *Id.* § 2(4).

³⁸ *Id.* § 4.

³⁹ *Facebook Terms of Service*, FACEBOOK, <https://en-gb.facebook.com/legal/terms> [<https://perma.cc/Q937-7GAH>].

billion users.⁴⁰ Instagram is primarily a photo and video sharing service where users can upload photos or videos to share with their followers or with a select group of friends, but users can also view, comment and like posts shared by their friends on Instagram.⁴¹ Courts have held that non-public postings on social media accounts are covered by the SCA,⁴² so, in those cases where a fiduciary seeks access to the social media accounts of a deceased user, the custodians may refuse such requests based on lack of user consent.⁴³

Digital assets that do not contain the content of electronic communications receive less protection, and RUFADAA plainly states that the custodian “shall disclose” the user’s catalogue of electronic communications and any other non-protected digital assets to a fiduciary.⁴⁴ The Comment to Section 8 of RUFADAA emphasizes the mandatory nature of this disclosure requirement, explaining that “[s]ection 8 requires disclosure of all other digital assets, unless prohibited by the decedent or directed by the court, . . . [and] Section 8 was intended to give personal representatives default access to the

⁴⁰ Ashley Carman, *Instagram Now Has 1 Billion Users Worldwide*, (June 20, 2018, 2:02 PM), <https://www.theverge.com/2018/6/20/17484420/instagram-users-one-billion-count> [<https://perma.cc/2S6M-KLVQ>].

⁴¹ *What is Instagram*, INSTAGRAM: HELP CTR., <https://help.instagram.com/424737657584573> [<https://perma.cc/PYS9-EJ67>].

⁴² See *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 991 (C.D. Cal. 2010) (“With respect to webmail and private messaging, the court is satisfied that those forms of communications media are inherently private such that stored messages are not readily accessible to the general public.”); *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 669 (D. N. J. 2013) (finding that when a user configures a Facebook wall post to be inaccessible to the general public, the wall posts are configured to be private for purposes of the SCA); *Viacom Int’l Inc. v. YouTube Inc.*, 253 F.R.D. 256, 2008 U.S. Dist. LEXIS 50614, 87 U.S.P.Q.2D (BNA) 1170 (S.D.N.Y. filed July 2, 2008) (finding that the Electronic Communications Privacy Act does not prevent disclosure of non-content data about private videos posted on YouTube).

⁴³ See generally *In re Ellsworth*, No. 2005-296. 651-DE (Mich. Prob. Ct. 2005); Tracy Sears, *Family, Lawmakers Push for Facebook Changes Following Son’s Suicide*, WTVR (Jan. 8, 2013, 8:11 PM), <https://wtvr.com/2013/01/08/legislation-introduced-for-access-to-deceased-persons-digital-property/> [<https://perma.cc/3QU5-XXUM>].

⁴⁴ RUFADAA § 8.

‘catalogue’ of electronic communications and other digital assets not protected by federal privacy law.”⁴⁵

In order to gain access to any of the deceased user’s digital assets, the fiduciary is required to send a request to the custodian, along with a certified copy of the user’s death certificate and the document granting fiduciary authority.⁴⁶ In all cases, however, the custodian has the ability to request that the fiduciary obtain a court order finding that disclosure of the user’s digital assets is reasonably necessary for estate administration.⁴⁷ RUFADAA makes it clear that fiduciaries dealing with digital assets are subject to the same duties that apply to the management of other assets,⁴⁸ and that RUFADAA is designed to be an overlay statute that works in conjunction with a state’s existing laws on probate, guardianship, trusts, and powers of attorney.⁴⁹ Furthermore, RUFADAA also protects custodians from liability for any actions taken in accordance with its provisions.⁵⁰

IV. PROPERTY INTEREST IN DIGITAL ASSETS

RUFADAA reflects the general consensus about one basic principle: digital assets are property.⁵¹ The notion that a user possesses a distinct property interest in underlying electronic records is supported by the custodians’ own terms of service agreements. The provisions in these agreements emphasize that any material created or uploaded by the

⁴⁵ RUFADAA § 8 cmt.

⁴⁶ RUFADAA §§ 7, 8.

⁴⁷ RUFADAA §§ 7(5)(D), 8(4)(D).

⁴⁸ RUFADAA § 15.

⁴⁹ RUFADAA § 17.

⁵⁰ RUFADAA § 16.

⁵¹ See *Ajemian v. Yahoo!, Inc.*, 84 N.E.3d 766, 780 (2017) (Grant, J., dissenting) (pointing out that Yahoo! had not disputed a lower court’s finding that the contents of an email account were the property of a deceased user’s estate.); Alberto B. Lopez, *Article: Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets*, 24 GEO. MASON L. REV. 183, 215 (2016). In addition, the Internal Revenue Service treats Bitcoin as property for federal taxation purposes. I.R.S. Notice 2014-21, 2014-16 I.R.B. (April 14, 2014), <https://www.irs.gov/pub/irs-drop/n-14-21.pdf>.

user, such as photos, files, or documents, remains the property of the user. For example, Facebook's terms of use policy provide that:

You own the content you create and share on Facebook and the other Facebook Products you use, and nothing in these Terms takes away the rights you have to your own content. You are free to share your content with anyone else, wherever you want. To provide our services, though, we need you to give us some legal permissions to use that content.⁵²

Similar terms also apply to the photos, videos, and images stored on Instagram, which is owned by Facebook.⁵³ Oath Holdings, Inc.,⁵⁴ which owns Yahoo Mail and AOL.com, states in their terms of service agreement that "[e]xcept as otherwise provided in the specific product terms or guidelines for one of our Services, when you upload, share with or submit content to the Services you retain ownership of any intellectual property rights that you hold in that content"⁵⁵ Google's terms of service, which also cover YouTube and Google Drive accounts, provide that "[s]ome of our Services allow you to upload, submit, store, send or receive content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours."⁵⁶ The terms of service for Dropbox state that "[w]hen you use our Services, you provide us with things like your files, content, messages, contacts and so on ("Your Stuff"). Your Stuff is yours. These Terms don't give us any rights to Your

⁵² *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> [<https://perma.cc/S9WM-H4QM>].

⁵³ Instagram's terms of use provide as follows: "We do not claim ownership of your content that you post on or through the Service." *Terms of Use*, INSTAGRAM, <https://help.instagram.com/581066165581870> [<https://perma.cc/PL97-L5T3>].

⁵⁴ Oath was renamed Verizon Media effective January 8, 2019. See Todd Spangler, *Verizon is Officially Killing the Oath Name* (December 18, 2018), <https://finance.yahoo.com/news/verizon-officially-killing-oath-name-011702437.html> [<https://perma.cc/6ZPJ-QK96>].

⁵⁵ *Terms of Service*, OATH, <https://policies.oath.com/us/en/oath/terms/otos/index.html> [<https://perma.cc/BZ6M-JAMB>].

⁵⁶ Content in Google Services, GOOGLE: TERMS OF SERVICE, <https://policies.google.com/terms?hl=en-US#toc-content> [<https://perma.cc/9LMV-T6GY>].

Stuff except for the limited rights that enable us to offer the Services.”⁵⁷

These declarations by custodians acknowledging the user’s ownership rights to the items stored online are based primarily on the protectable copyright interest of the creator.⁵⁸ Copyright protection exists “in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁵⁹ Written documents stored on Google Drive or Dropbox, for example, and any videos, photos, or images uploaded by the user to Google Photos or YouTube satisfy the requirement of a fixed medium of expression necessary for copyright protection.⁶⁰ As the author or creator of the material, ownership of the copyright vests in the user regardless of where their content is posted or stored.⁶¹ For purposes of inheritability, basic principles of probate law provide that a separate intangible property interest in the copyright itself can be passed under a will or a state’s intestate succession laws.⁶² So, when an account owner dies, the physical computer, phone, or hard drive along with any videos, documents, and photos stored on the devices would pass as tangible property, but the copyright to the stored content would pass separately to the heirs.⁶³

While the user maintains a property interest in their digital assets, the custodian maintains control over the account where the digital property is stored.⁶⁴ The terms of service agreements typically include

⁵⁷ *Terms of Service*, DROPBOX (DEC. 8, 2016), <https://www.dropbox.com/terms2016> [<https://perma.cc/R6HD-BAK3>].

⁵⁸ Lopez, *supra* note 51, at 215.

⁵⁹ 17 U.S.C. § 102(a) (2012).

⁶⁰ Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns A Decedent’s E-Mails: Inheritable Probate Assets or Property Of The Network?*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 281, 288 (2007).

⁶¹ 17 U.S.C. § 201(a) (2012).

⁶² Darrow & Ferrera, *supra* note 60, at 286-87.

⁶³ Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. REV. 927, 988 (2016).

⁶⁴ Ashley F. Watkins, *Digital Properties and Death: What Will Your Heirs Have Access to After You Die?*, 62 BUFFALO L. REV. 193, 216 (2014).

provisions prohibiting the transfer of rights in the account upon the death of the user and permitting a custodian to delete the account at any time. For instance, Section 3 of Oath's terms of service agreement provide "all Oath accounts are non-transferable, and any rights to them terminate upon the account holder's death."⁶⁵ If a user has not yet agreed to the new terms of service with Oath, Yahoo's "legacy" terms of service apply and state that:

No Right of Survivorship and Non-Transferability. You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.⁶⁶

Under its Account Help section, Google states, "[w]e can work with immediate family members and representatives to close the account of a deceased person where appropriate. In certain circumstances we may provide content from a deceased user's account."⁶⁷ The terms of service agreement for Dropbox contain similar prohibitions against assignment of the agreement, and a statement that the terms create no third party beneficiary rights.⁶⁸ Section 4 of Facebook's terms of service similarly declare "[y]ou will not transfer any of your rights or obligations under these Terms to anyone else without our consent."⁶⁹

Statements prohibiting the transfer or assignment of the user's account are seemingly at odds with the other statements in the terms of service agreements declaring that the user retains ownership of their content

⁶⁵ OATH, *supra* note 55.

⁶⁶ *Terms of Service*, YAHOO, <https://policies.yahoo.com/us/en/yahoo/terms/utos/index.htm> (click on the "legacy Yahoo Terms of Service" hyperlink; then click the hyperlink for "Yahoo Terms") (last visited Apr. 23, 2020).

⁶⁷ *Submit a Request Regarding a Deceased User's Account*, GOOGLE: ACCT HELP, <https://support.google.com/accounts/troubleshooter/6357590?hl=en> [<https://perma.cc/QJE7-C9SM>].

⁶⁸ DROPBOX, *supra* note 57.

⁶⁹ FACEBOOK, *supra* note 52.

material. Provisions that permit the custodian to terminate all control and rights of access to the user's account, and possibly even delete the contents, are valid only if there is no underlying property interest capable of being transferred, which contradicts the custodians' own declarations.⁷⁰ A user's heirs theoretically have a separate, underlying property interest in decedent's digital assets, based on copyright law, that can be passed pursuant to a will or a state's intestate succession laws. Even if the user does not explicitly mention digital assets in the will, all professionally drafted wills have a residuary clause which transmits any items, such as digital assets, not specifically mentioned to named beneficiaries.⁷¹ Likewise, when a user dies without a valid will, the intestacy scheme distributes all assets to the heirs.⁷² An estate fiduciary has an obligation to marshal all of the decedent's assets wherever they are located. This obligation extends to any digital property owned by the user but controlled by a custodian, notwithstanding statements to the contrary contained in the terms of service agreement.

V. INHERITING DIGITAL ASSETS AFTER RUFADAA: WHAT ISSUES REMAIN?

While RUFADAA resolves many questions surrounding fiduciary access to digital assets, digital property continues to be a focus area in estate litigation. There is scant case law interpreting RUFADAA, but a few recent court decisions and related commentaries highlight the lingering issues that confront a fiduciary seeking access to the digital assets of a deceased user.⁷³ One problem is that, absent clear language in RUFADAA describing what actions the fiduciary may take with respect to digital assets, the scope of fiduciary powers to control or manage digital property after the user's death remains unclear. In addition, RUFADAA is structured so that custodians have complete discretion to insist that a fiduciary obtain a court order prior to

⁷⁰ Natalie M. Banta, *Property Interests in Digital Assets: The Rise of Digital Feudalism*, 38 CARDOZO L. REV. 1099, 1131 (2017).

⁷¹ David Horton, *Contractual Indescendibility*, 66 HASTINGS L.J. 1047, 1052 (2015).

⁷² *Id.*

⁷³ See, e.g., E. Edwin Eck, *Revised Uniform Fiduciary Access to Digital Assets Act and Its Impact on Estate Planning*, 43 MONT. LAW. 20 (2017).

receiving access to the decedent's digital assets, which, in practice, may lead to court orders becoming a *de facto* requirement. RUFADAA also allows the custodian to select the manner of disclosure regarding digital assets, leading to further administrative delays in the settlement of an estate. Finally, custodians continue to include forum selection and choice of law provisions in their terms of service agreements in an attempt to override well-settled probate law that prioritizes the laws of the decedent's domicile in matters related to estate administration.

a. Fiduciary Powers Not Clearly Defined

RUFADAA leaves open the question of how much authority a fiduciary actually possesses with respect to the decedent's digital assets. The current language in RUFADAA requires the custodian to "disclose" information to the fiduciary about the user's digital assets, without specifically granting the fiduciary any accompanying powers to engage in transactions with the property. Notably, under the statutory scheme of UFADAA, fiduciaries originally had the ability to "access" the digital assets of the decedent.⁷⁴ The Uniform Law Commission acknowledged that one of the reasons that custodians were reluctant to embrace UFADAA in its initial form was their concern that the term "access" could be interpreted differently by various constituencies.⁷⁵ The Uniform Law Commission changed the terminology from granting a fiduciary "access" under UFADAA to providing a fiduciary with "disclosure" about the assets under RUFADAA, explaining the reasoning for the change as follows:

Fiduciaries need access to information contained in online accounts, but not necessarily to the account itself. Internet firms expressed concern that the language of UFADAA required them to allow a fiduciary full online access to an account, with the

⁷⁴ UFADAA § 8.

⁷⁵ Proposed Changes to the Uniform Fiduciary Access to Digital Access Act, Unif. L. Comm'n (2015), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6cdd65e9-e4ee-3791-2132-7f4223fb6cef&forceDialog=0> [<https://perma.cc/AZ2K-84UY>].

attendant risk that full access was neither intended, nor necessary. The proposed amendments clarify that disclosure of information is what RUFADAA requires, and new Section 6(a) provides the custodians of digital assets with a choice of how to disclose the requested information.⁷⁶

Even though RUFADAA now entitles a fiduciary to disclosure rather than access to the digital assets of the decedent, inconsistent terminology is used in various parts of RUFADAA to explain the fiduciary's powers. For instance, the Prefatory Note states that the purpose of RUFADAA is to give fiduciaries the legal authority to *manage* digital assets in the same way they *manage* tangible assets.⁷⁷ In the body of RUFADAA, although Section 8 is titled "*Disclosure of Digital Assets of a Deceased User*," the official comment to the section provides that "[s]ection 8 was intended to give personal representatives default *access* to the 'catalogue' of electronic communications and other digital assets not protected by federal privacy law."⁷⁸ RUFADAA concludes by referring to a fiduciary's power to manage digital assets, as one of the final provisions of RUFADAA states that "[t]he legal duties imposed on a fiduciary charged with *managing* tangible property apply to the *management* of digital assets, including: (1) the duty of care; (2) the duty of loyalty; and (3) the duty of confidentiality."⁷⁹

The variable use of imprecisely defined terms, such as "access," "disclosure," and "manage," across different parts of RUFADAA creates ambiguity as to the exact scope of fiduciary authority with respect to a deceased user's digital assets, which may be intentional. According to Suzanne B. Walsh, who chaired the drafting commission for RUFADAA, the term "access" was purposely not defined in UFADAA because the nature of the fiduciary's authority depends on

⁷⁶ *Id.*

⁷⁷ RUFADAA Prefatory Note (emphasis added).

⁷⁸ RUFADAA, § 8 cmt. (emphasis added).

⁷⁹ RUFADAA, § 15(a) (emphasis added).

the type of digital asset involved.⁸⁰ Utilizing this approach, and delineating fiduciary powers based on the character of the underlying asset, means that fiduciary authority should be more expansive when the custodian possesses non-content, non-protected digital assets of a deceased user. Under RUFADAA, the content of any electronic communications is accessible to a fiduciary only when 1) the user consents to such disclosure and 2) the fiduciary authority in this situation is spelled out by the user in the online tool, will, or other written directive.⁸¹ Disclosure of any non-protected digital assets, on the other hand, is mandated under RUFADAA and fiduciaries are granted “default access” to these assets of the decedent.⁸² In order to give full effect to this default provision and make non-protected assets automatically available to the fiduciary, a fiduciary’s authority over non-protected digital property should be interpreted more broadly. A fiduciary should be able to take possession of, control, manage, use, distribute, transfer, or otherwise dispose of any digital assets of a deceased user not subject to protections under federal privacy laws.

Broader fiduciary authority over non-protected digital assets is implied in RUFADAA, and the fiduciary’s power to conduct transactions in this type of property should be more clearly aligned with the customary actions a fiduciary may take with respect to estate property in general, namely the power to retain assets, receive assets, and acquire or dispose of assets.⁸³ Once it is established that the digital property held by the custodian constitutes non-protected digital assets, the fiduciary should be allowed to collect, use, manage, control, transfer, and even dispose of the property. The custodian’s own statements acknowledge that the contents of the user’s account are the user’s property, but without the ability to marshal and collect the estate’s assets, a fiduciary cannot properly administer the decedent’s estate.

⁸⁰ Suzanne B. Walsh, *Coming Soon To A Legislature Near You: Comprehensive State Law Governing Fiduciary Access to Digital Assets*, 8 CHARLESTON L. REV. 429, 445 (2014).

⁸¹ RUFADAA § 4.

⁸² RUFADAA § 8 cmt.

⁸³ UNIF. PROB. CODE § 3-715(1)-(2), (5)-(6), (11) (1969) (amended 2010).

The language in RUFADAA should be revised to make it clear that, at least with respect to non-protected digital property, a fiduciary is permitted to collect and manage these assets in the same manner as other estate property.⁸⁴ Section 8 of RUFADAA, which contains the default provision covering non-protected digital assets, currently states that “a custodian shall disclose”⁸⁵ information about these assets to the personal representative of the estate of a deceased user.⁸⁶ This language can be supplemented with an additional statement to make it clear that a fiduciary may also access, transfer, copy, or even dispose of any non-protected digital assets or digital account.⁸⁷ Without a corresponding right to retrieve the non-protected digital assets, the default provision of RUFADAA is virtually meaningless. Delaware’s version of RUFADAA explicitly states that a “fiduciary may exercise control over any and all rights in digital assets and digital accounts of an account holder,”⁸⁸ and that if any provision in a terms of service agreement “limits a fiduciary’s access to or control over a digital asset or digital account of an account holder, the provision is void as against the strong public policy of this State . . .”⁸⁹ Similar language can be adopted by other states to clarify that fiduciary authority over non-protected digital assets extends beyond merely receiving disclosure about the existence of such assets. This additional statutory language will operate as a safeguard to prevent custodians from enforcing non-transferability provisions contained in their terms of service agreements against a fiduciary seeking to obtain control over non-protected digital assets from the custodian.

b. Custodian’s Discretion To Require A Court Order

In its current form, RUFADAA permits a custodian to insist that a fiduciary obtain a court order before any information about the

⁸⁴ REV. UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT (2015), Summary Sept. 2017, *supra* note 31 (stating that “other types of digital assets are not communications, but intangible personal property”).

⁸⁵ RUFADAA § 8.

⁸⁶ RUFADAA § 8.

⁸⁷ DEL. CODE ANN. tit. 12, § 5005(b) (2019).

⁸⁸ DEL. CODE ANN. tit. 12, § 5004 (2019).

⁸⁹ *Id.*

deceased user's digital assets are disclosed. The custodian can require a court order despite the deceased user's explicit instructions, contained in a will, allowing disclosure of the contents of electronic communications,⁹⁰ and even though the disclosure is mandated because the assets in question are non-protected.⁹¹ Requiring the fiduciary to seek a court order when the decedent has included a clear directive in a validly executed will is simply redundant, and there is no valid reason to request that a court re-examine explicit instructions contained in a will regarding the disposition of decedent's property.⁹² It is particularly inappropriate for a custodian to routinely request court orders prior to the disclosure of any non-protected digital assets since RUFADAA mandates that the custodian provide this information to the fiduciary.⁹³ To limit the unfettered discretion afforded custodians and to prevent possible abuse, RUFADAA should be revised to restrict the custodian's ability to request a court order prior to disclosing non-protected digital assets to unusual situations, such as when the ownership of the account must be verified.⁹⁴

Recent New York cases indicate that custodians will treat the court order as a de facto requirement for disclosure of non-protected digital assets to the fiduciary. In *In re Estate of Serrano*, the executor in a small New York estate proceeding asked that Google release the decedent's contacts and calendar information so that the executor could inform friends of his passing and wind up any unfinished business.⁹⁵ Prior to disclosing the information, Google instructed the executor to obtain a court order specifying that disclosure of the requested electronic information "would not violate any applicable laws, including but not limited to the Electronic Communications Privacy Act and any state equivalent."⁹⁶ In its decision, the court held that the requested information was not protected under New York's version of RUFADAA, stating that "to the extent that information

⁹⁰ RUFADAA § 7(5)(C).

⁹¹ RUFADAA § (4)(D).

⁹² Lopez, *supra* note 51, at 235.

⁹³ RUFADAA § 8 (4)(D).

⁹⁴ Lopez, *supra* note 51, at 239.

⁹⁵ *In re Estate of Serrano*, 54 N.Y.S.3d 564, 565 (N.Y. Sur. Ct. 2017).

⁹⁶ *Id.*

about a user's contacts is 'information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person,' it is considered a catalogue of electronic communication."⁹⁷ The court found that since no transfer of information between two parties occurs when a calendar entry is made, a user's calendar is not an electronic communication but rather a non-protected digital asset.⁹⁸ The court directed Google to disclose the calendar and contact information to the executor, declaring that "disclosure of the requested non-content information is permitted, *if not mandated*, by article 13-A of the EPTL and does not violate the ECPA."⁹⁹

In another recent case, a Broadway executive died unexpectedly and his husband sought access to his spouse's iCloud account with Apple, Inc. so that he could retrieve family photos stored online.¹⁰⁰ Apple refused to provide the executor with access to his husband's photo account without a court order, so he filed a request for access with the Manhattan Surrogate's Court.¹⁰¹ The court noted that the decedent had not granted his executor access to his digital assets through an online tool, or pursuant to a provision in his will or any other written document.¹⁰² The court observed, however, that "decedent's photographs stored in his Apple account are clearly not 'electronic communications,' the disclosure of which, in the absence of a court order, requires consent of the account holder in any form listed under EPTL 13-A-2.2."¹⁰³ As a result, Apple was required to grant access to the photographs since no lawful consent was required pursuant to the SCA. The court noted that decedent's property includes "assets kept in a digital form in cyberspace" and that New York's version of RUFADAA was enacted "to apply traditional laws governing fiduciaries to this 'new type of property'" and authorize

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ *In re Scandalios*, 2019 WL 266570 (N.Y. Sur. Ct. 2019).

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 3.

¹⁰³ *Id.*

fiduciaries to "gain access to, manage, distribute and copy or delete digital assets."¹⁰⁴

A fairly routine application of New York's version of RUFADAA also occurred where an executor was denied access to the decedent's email account with Google.¹⁰⁵ The decedent had not activated Google's online tool and did not address the disclosure of such assets in a will or other record, so Google refused to provide the executor with access to the content of decedent's email account.¹⁰⁶ In its decision denying the executor's request, the court stated that:

Although no one has appeared in opposition to the requested relief, in this evolving area, the undersigned is concerned that unfettered access to a decedent's digital assets may result in an unanticipated intrusion into the personal affairs of the decedent or disclosure of sensitive or confidential data, for example, information unrelated to his business or corporation. Thus, the court must balance the fiduciary's duty to properly administer this estate, while avoiding the possibility of unintended consequences.¹⁰⁷

The court directed Google to disclose only the contact information stored and associated with the account and noted that a separate application could be made to expand the authority to include the content of the electronic communications in the event greater access to the account was warranted.¹⁰⁸ While it is not entirely clear from the facts of this case, it does not appear that Google responded to the executor's initial request with an offer to provide a catalogue of decedent's electronic communications. Providing the executor with the mandated non-content information would have indicated a willingness on Google's part to resolve the situation informally. Google instead

¹⁰⁴ *Id.*

¹⁰⁵ *In re Estate of White*, 2017 WL 8944064, 1 (N.Y. Sur. Ct. 2017).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

exercised its right under RUFADAA to insist on a court order, but then did not even appear in court to defend its position.¹⁰⁹

A custodian's unilateral right to demand a court order prior to the disclosure of all digital assets places an unfair burden on personal representatives, as well as the courts. There is an incentive for a custodian to insist that a fiduciary seek a court order prior to the disclosure of digital assets since it provides a relatively simple way for the custodian to protect against liability for improper disclosure, while at the same time shifting the administrative burden and cost for this protection to the deceased user's estate. In small estate proceedings, this burden may be especially significant and have a chilling effect. When a fiduciary utilizes the summary estate proceedings to settle a small estate, there is little incentive to hire an estate attorney for the sole reason of obtaining a court order to access digital assets that most likely hold sentimental, rather than monetary, value. The custodian's complete discretion to require a court order, even prior to the disclosure of non-protected digital assets, is particularly troubling since disclosure of these assets is mandatory under RUFADAA. As seen in both *Serrano* and *Scandalios*, the custodian can refuse to provide information about non-protected assets based on the SCA and privacy concerns, even though these objections do not apply to non-protected assets, then wait to see whether the fiduciary will actually seek the court order. Compounding the problem of unfettered discretion to require a court order is the custodian's freedom to choose among three levels of disclosure, which may lead to further unnecessary delays in the administration of an estate. A custodian providing information about the deceased user's digital assets may elect to provide full access, partial access, or to provide a "data dump."¹¹⁰ Under the existing framework of RUFADAA, it is possible for the custodian to insist on a court order prior to disclosing non-protected digital assets, then choose to provide the executor with only

¹⁰⁹ *Id.*

¹¹⁰ RUFADAA § 6(a).

partial access, but then the fiduciary may need to return to court to obtain full access.¹¹¹

Custodians currently can treat the court order as an additional requirement for a fiduciary seeking disclosure of mandated information, which surely was not the intention when RUFADAA was approved.¹¹² RUFADAA makes it clear that access to the non-protected digital assets of the decedent should be routine.¹¹³ The language of RUFADAA should be revised to curb a custodian's discretion to request court orders for disclosure of non-protected digital assets to unusual circumstances, such as when the ownership of the account must be verified.¹¹⁴ If this loophole is not closed, court orders may become a mandatory requirement for disclosure of any type of digital assets. In addition, the estate fiduciary, rather than the custodian, should be able to determine the extent and manner of disclosure based on the needs of a particular estate administration, placing the burden on the custodian to justify any refusal to comply with the executor's request.

c. Enforceability of Forum Selection and Choice of Law Provisions

Prior to creating an online account, a user must agree to the custodian's terms and conditions governing access to the account where the digital assets will be stored. These terms of service agreements, generally drafted in a manner that is advantageous to the custodian, are viewed as contracts of adhesion.¹¹⁵ Courts have

¹¹¹ Elizabeth Sy, *Comment: The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught Up With Technology?*, 32 *TOURO L. REV.* 647, 675 (2016).

¹¹² See Renee R. Roth & Daniel G. Fish, *Access by Fiduciaries to Digital Assets*, *NEW YORK LAW JOURNAL* (Feb. 20, 2018), http://www.mclaughlinstern.com/docs/publications/NYLJ_Access_by_Fiduciaries_to_Digital_Assets.pdf.

¹¹³ See RUFADAA § 8 cmt. ("Section 8 was intended to give personal representatives default access to the "catalogue" of electronic communications and other digital assets not protected by federal privacy law.").

¹¹⁴ Lopez, *supra* note 51, at 239.

¹¹⁵ Black's Law Dictionary defines the adhesion contract, or contract of adhesion, as a "[s]tandardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity

distinguished between two forms of online contracts of adhesion based on the method in which the user agrees to the terms. A “click-wrap” agreement typically requires the user to click an “I agree” box after being presented with the terms.¹¹⁶ A “browse-wrap” agreement is one “where website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen.”¹¹⁷ Click-wrap agreements are generally enforceable since the parties have constructive notice of the terms and make an affirmative act to agree to them by clicking “I agree.”¹¹⁸ Browse-wrap agreements, on the contrary, are usually unenforceable because the terms are not conspicuous and the user must click a hyperlink to view the terms and does not need to view these terms to use the service.¹¹⁹ The Second Circuit has addressed the enforceability of terms in browse-wrap agreements and stated that “reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.”¹²⁰ The court further stated that a user is not expected to search for the terms and conditions when using a free online service because the transaction does not compare to “the paper world of arm's-length bargaining.”¹²¹

Even when the provisions contained in a terms of service agreement are reasonably communicated and accepted, and there is evidence that a user has affirmatively agreed to be bound by the provisions, a court

to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms.” Contract of Adhesion, BLACK’S LAW DICTIONARY 38 (10th ed. 2014).

¹¹⁶ Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

¹¹⁷ *Id.*

¹¹⁸ Joseph Ronderos, *Is Access Enough?: Addressing Inheritability of Digital Assets Using the Three-Tier System Under the Revised Uniform Fiduciary Access to Digital Assets Act*, 18 TENN. J. BUS. L. 1031, 1054 (2017).

¹¹⁹ *Id.*

¹²⁰ *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (declining to apply terms in a browse-wrap agreement); *see also* Hines, 668 F. Supp. 2d at 366 (declining to enforce forum selection clause contained in a browse-wrap agreement).

¹²¹ *Specht*, 306 F.3d at 32.

may look beyond mutual assent and find that the terms are unconscionable and should not be enforced. A two-part test for unconscionability has been successfully asserted by consumers seeking to avoid terms contained in a contract of adhesion.¹²² A user must first show that a term in an online contract is procedurally unconscionable, which usually means that it has been offered on a take-it-or-leave-it basis by a party with superior bargaining muscle, or it is buried in fine print.¹²³ A provision must also be found to be substantively unconscionable, meaning that it is unfair, one-sided, or unreasonably favorable to the drafter.¹²⁴

When an adhesion contract contains a forum selection provision, courts will generally enforce the clause absent “a strong showing that: (1) the clause was the product of fraud or overreaching; (2) enforcement would be unreasonable and unjust; (3) proceedings in the contractual forum will be so gravely difficult and inconvenient that the party challenging the clause will for all practical purposes be deprived of his day in court; or (4) enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”¹²⁵ A court may, however, refuse to enforce a forum selection clause where the chosen state has no substantial relationship to the parties or the transaction, or where application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.¹²⁶ The burden of proving that the forum selection clause is unconscionable rests with the party objecting to its enforcement. The Supreme Court has stated, “. . . it should be incumbent on the party seeking to escape his contract to show that trial in the contractual

¹²² *Horton*, *supra* note 71, at 1067.

¹²³ *Horton*, *supra* note 71, at 1067.

¹²⁴ *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (stating that a contract clause should be enforced absent a showing that “enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching”).

¹²⁵ *EMC Corp. v. Petter*, 104 F. Supp. 3d 127 (D. Mass. 2015) (applying the test set forth in *Bremen* to an electronic restricted stock agreement).

¹²⁶ *Id.*

forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.”¹²⁷

Custodians frequently include broadly worded provisions in their terms of service agreements,¹²⁸ but if the question pertains to the probate or inheritability of digital assets the deceased user’s domicile has an overwhelming interest in adjudicating matters relating to the user’s estate property. It is well-settled probate law that the laws of the decedent’s domicile determine which court has proper jurisdiction to probate the will and administer the estate,¹²⁹ and the laws of the domicile also govern intestate distribution of assets in the event there is no will.¹³⁰ In New York, domicile is defined by statute as that fixed, permanent and principal home to which a person wherever temporarily located always intends to return.¹³¹ In Florida, domicile means a person’s usual place of dwelling.¹³² While the exact definition of “domicile” varies from state to state, the meaning is essentially the

¹²⁷ *Bremen*, 407 U.S. at 18.

¹²⁸ Facebook, for example, provides in its Terms of Service under 4. Disputes “[f]or any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms or the Facebook Products (“claim”), you agree that it will be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County. You also agree to submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Terms and any claim, without regard to conflict of law provisions.” FACEBOOK, *supra* note 52. Google’s Terms of Service provides that the “laws of California, U.S.A., excluding California’s conflict of laws rules, will apply to any disputes arising out of or relating to these terms or the Services. All claims arising out of or relating to these terms or the Services will be litigated exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.” GOOGLE, *supra* note 56.

¹²⁹ UNIF. PROB. CODE § 3-201 (1969) (amended 2010) (stating that the “[v]enue for the first informal or formal testacy or appointment proceedings after a decedent’s death is: (1) in the [county] where the decedent had his domicile at the time of his death . . .”).

¹³⁰ See UNIF. PROB. CODE § 2-101 (1969) (amended 2010).

¹³¹ N.Y. Surr. Ct. Proc. Act § 103(15) (1966).

¹³² FLA. STAT. § 731.201(13) (2018).

same. Domicile is the “preeminent headquarters” that every person is compelled to have so that certain rights and duties may be determined.¹³³ The selection of a particular location as one’s permanent home indicates, in part, a willingness to accept the privileges afforded by that state’s laws and a readiness to be subject to the obligations imposed by it.

The laws of the decedent’s domicile may have significant financial implications for the estate as well. For example, California law grants surviving family members the right to control the name, likeness, voice and image of a deceased person for 70 years after death,¹³⁴ while New York does not grant publicity rights. In 2012, the beneficiaries of the estate of Marilyn Monroe claimed that they inherited a right of publicity under California law even though Monroe’s executors had for forty years asserted in probate proceedings that her domicile was in New York.¹³⁵ The Ninth Circuit held that Marilyn Monroe’s estate could not claim Monroe’s rights of publicity under California law because the estate had previously claimed in unrelated suits that she was domiciled in New York at the time of her death.¹³⁶ The court stated that “[b]ecause Monroe died domiciled in New York, New York law applies to the question of whether Monroe LLC has the right to enforce Monroe’s posthumous right of publicity. Because no such right exists under New York law, Monroe LLC did not inherit it through the residual clause of Monroe’s will, and cannot enforce it”¹³⁷

Custodians attempt to override basic probate law through the inclusion of forum selection and choice of law clauses in their terms of service agreements.¹³⁸ These clauses typically dictate that the state laws of

¹³³ *Williamson v. Osenton*, 232 U.S. 619, 625 (1914).

¹³⁴ CAL. CIV. CODE § 3344.1 (Deering 2019); *see also* Fla. Stat. § 540.08 (2018) (in Florida the right of publicity extends for 40 years).

¹³⁵ *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 998 (9th Cir. 2012).

¹³⁶ *Id.*

¹³⁷ *Id.* at 1000.

¹³⁸ Natalie M. Banta, *Article: Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799, 824-25 (2014).

California will govern any disputes, and that all claims must be resolved in a state or federal court located in Santa Clara County, California.¹³⁹ But the state of California is not likely to have any significant connection to the probate or intestate distribution of the digital property of their users unless the user is domiciled in California.¹⁴⁰ Given that only a small percentage of all users are permanently situated in California, it is questionable whether these contractual terms would supersede the strong interest of the decedent's own domicile to settle the estate and resolve probate matters.

A forum selection clause contained in a terms of service agreement was at issue in *Ajemian v. Yahoo!*¹⁴¹ John Ajemian died intestate in 2006 and his siblings requested access to his email account from Yahoo! so that they could inform friends of his passing and identify his assets.¹⁴² Yahoo! declined the request on the grounds that such disclosure would violate the Stored Communications Act.¹⁴³ The trial court in Massachusetts initially dismissed an action brought by the executor against Yahoo!, concluding that the forum selection clause in the terms of service agreement required the action to be brought in California, not Massachusetts.¹⁴⁴ On appeal, the court concluded that Yahoo! had not carried its burden to demonstrate that the forum selection clause was reasonably communicated and accepted, and based on all of the facts and circumstances, the court ultimately

¹³⁹ See *Bremen*, *supra* note 127 and accompanying text.

¹⁴⁰ Data collected by the custodian is unlikely to be physically stored in California since custodians operate multiple data warehouse facilities across the country. Google, for example, maintains data centers across the world but none are physically located in California. See GOOGLE DATA CENTERS, <https://www.google.com/about/datacenters/inside/locations/index.html> [<https://perma.cc/CL8M-FL78>]. Even if the data pertaining to the digital assets of a deceased user is physically stored in California, a fiduciary could gain authority over any digital assets located outside the state of decedent's domicile through an ancillary probate proceeding. See UNIF. PROB. CODE Art. IV cmt. (1969) (amended 2010).

¹⁴¹ *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565 (2013).

¹⁴² *Id.* at 567.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 566.

declined to enforce the forum selection clause.¹⁴⁵ The court noted that the deceased user was domiciled in Massachusetts at the time of his death and Yahoo! offered nothing to suggest that jurisdiction over the assets of his estate belonged anywhere other than Massachusetts.¹⁴⁶ The court added that nothing appeared to connect the estate assets to California. The administrators were residents of Massachusetts and were appointed by the Probate and Family Court in Massachusetts and Yahoo! was a Delaware corporation with a principal place of business in California.¹⁴⁷ As a result, there was no relationship between the estate and the decedent's email account to California that would make *in rem* jurisdiction over the emails reasonable in California.¹⁴⁸ The court also noted that Yahoo! had not asserted that the California probate court would even entertain *in rem* jurisdiction over the user's estate or his assets.¹⁴⁹

Enforcing forum selection and choice of law provisions in terms of service agreements may be contrary to public policy when the matter involves the estate proceeding of a deceased user. Courts have upheld forum selection and choice of law provisions in terms of service agreements, but these cases have primarily involved disputes between the user and custodian regarding the account services provided by the custodian.¹⁵⁰ When the issue pertains to the settlement of an estate as in *Ajemian*, the decedent's domicile is the appropriate forum and the laws of the domicile must be applied to resolve any questions surrounding inheritability.

¹⁴⁵ *Ajemian*, 83 Mass. App. Ct. at 577.

¹⁴⁶ *Id.* at 579.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See, e.g.*, *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012) (enforcing forum selection clause contained in Facebook's modified click-wrap agreement); *Brodsky v. Match.com LLC*, 2009 U.S. Dist. LEXIS 101167 (S.D.N.Y. 2009) (enforcing forum selection clause in Match.com's click-wrap agreement); *Rojas-Lozano v. Google, Inc.*, 2015 U.S. Dist. LEXIS 106726 (D. Mass. 2015) (enforcing a forum selection clause contained in Google's click-wrap agreement). *But see* *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362 (E.D.N.Y. 2009) (declining to enforce forum selection clause contained in a browse-wrap agreement).

To deal with potential conflicts contained in terms of service agreements, Delaware law contains the following preemption clause which reads as follows:

(c) A choice-of-law provision in an end user license agreement is unenforceable against a fiduciary action under this chapter to the extent the provision designates law that enforces or would enforce a limitation on a fiduciary's access to or control over digital assets or digital accounts that is void under subsection (b) of this section.¹⁵¹

Other states should follow Delaware's lead and take affirmative steps to negate any forum selection or choice of law provisions contained in terms of service agreements being enforced against fiduciaries. In addition to including strong preemption language, each state legislature should incorporate language that makes it clear that the state's own version of RUFADAA applies to a custodian if the user resides in the state or resided in this state at the time of the user's death.¹⁵² Without these preventive measures, fiduciaries acting under the state's authority face the possibility of litigation stemming from the custodian's request to transfer estate proceedings to California.

VI. Conclusion

RUFADAA attempts to clarify a fiduciary's authority to deal with the digital assets of a deceased user, but certain issues still remain. RUFADAA should be revised to reflect the broader powers a fiduciary possesses with respect to non-protected digital assets. Spelling out these fiduciary powers in more detail would make it clear that fiduciaries are entitled to more than merely disclosure about the existence of decedent's non-protected digital assets. Further, RUFADAA mandates that a custodian make available to a fiduciary any digital assets that do not include the content of electronic communications, so the custodian's discretion to require a court order

¹⁵¹ DEL. CODE ANN. tit. 12, § 5004 (2019).

¹⁵² *See, e.g.*, N.Y. EST. POWERS & TRUSTS § 13-A-2.1(b).

to access non-protected digital assets should be severely limited. Finally, the states should block attempts by the custodians to override well-settled inheritance law that requires estate matters to be resolved in the state of the decedent's domicile. Forum selection and choice of law provisions in terms of service agreements should be unenforceable in matters involving inheritance, and the custodians should defer to each state's own probate and succession laws to determine ownership and distribution of the assets and property of its domiciliaries. While significant progress has been made towards applying existing laws to fiduciaries dealing with digital assets, more work needs to be done to protect the property interests of deceased users.